
MCOPA Legal Counsel: Public Records Requests - Use of Force Policies


Public Records Requests: Use of Force Policies

Many, if not all, Chiefs have received public records requests for their agency's use of force policies in the past. *What is the MCOPA policy will respect to such requests?* They should be disclosed. While a complete recitation of the Massachusetts Public Records Law is not possible here, I have taken this opportunity to address several common questions with respect to such requests.

We know that under the Public Records Law, **public records** are defined to include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee" of any Massachusetts governmental entity. See G. L. c. 4, § 7(26). Every government record is presumed to be public **unless** it is subject to an exemption.

In what form must the request be made?

Requests can be made in many forms and either in person or in writing. They could be made by mail, facsimile or email. See G. L. c. 66, § 10(b); 950 CMR 32.05(3). The only requirement is that the person making the request provides a reasonable description of the information requested. See 950 CMR 32.05(4).

How should I respond to such requests?

The agency must respond to requests as soon as practicable, without unreasonable delay and within 10 calendar days. See G. L. c. 66, § 10(a-b); 950 CMR 32.05(2). Keep in mind this is 10 calendar days...not 10 business days. There are only two proper responses: (a) a written denial; or (b) an offer to provide the requested materials.

Does Exemption (b) apply to use of force policies?

No. Exemption (b) applies to records that are "related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance

of necessary governmental functions requires such withholding..." See G. L. c. 4, § 7(26)(b).

The purpose of this exemption is to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public cannot reasonably be expected to have a legitimate interest. See Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976).

Records may only be withheld under this exemption if the agency can show that: (i) the records relate solely to the internal personnel practices of the government entity; and (ii) proper performance of necessary government functions will be inhibited by disclosure.

It is the position of the MCOPA that this exemption does not apply to use of force policies. Exemption (b) should only be read to apply to internal personnel rules and practices, while use of force policies apply to how officers interact with the public in specific circumstances. In the past, the Supervisor of Public Records has applied Exemption (b) to only a very few narrow situations.

Does Exemption (n) apply to use of force policies?

No. Exemption (n) only applies to "records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety." See G.L. c. 4, § 7 (26)(n).

This exemption was meant to permit the withholding of certain policies and procedures, the release of which would jeopardize public safety. This exemption has not typically been used to withhold use of force policies and it is the position of the MCOPA that such policies must be provided if requested.

What fees can be charged for such requests?

An agency can charge a reasonable fee to recover the costs of complying with a public records request. See G. L. c. 66, § 10(a); see also 950 CMR 32.06. While a waiver of fees is encouraged in situations where disclosure is in the public interest, the Supervisor of Public Records cannot order a waiver of fees. See 950 CMR 32.06(5).

1. Estimates

An agency must provide a written, good faith estimate of the applicable fees to be incurred prior to complying with a public records request where the total costs are estimated to exceed **\$10.00**.

2. Fees for Search and Segregation Time

An agency is permitted to charge a pro-rated fee for **search time** and **segregation time**. This fee is based on the hourly rate of the lowest paid employee capable of performing the task. See 950 CMR 32.06(1)(c).

Search time: the time used to locate a requested record, pull it from the files, copy it and return it to the files.

Segregation time: the time used to delete exempt data from a requested public record.

It is almost always presumed that the lowest paid employee in an agency is capable of search and segregation of records. However, there could be some instances where the lowest paid office employee may not have the knowledge or experience required to segregate the exempt information from the non-exempt information contained in a

requested record, but this is rare.

3. Fees for Copies and Postage

The agency can charge copy costs of \$0.20 per page. See 950 CMR 32.06(1)(a).

The agency can charge a fee of \$0.50 per page for computer printout copies of public records. See 950 CMR 32.06(1)(d).

The agency may also charge the actual cost of postage.

If ordinary means of reproduction are not possible due to the type of request, the agency may use other means, such as photographs or computer tapes and diskettes. In such case, the actual cost of reproduction may be charged. 950 CMR 32.06(1)(f); see also SPR Bulletin 4-96, June 7, 1996 (Fees for Access and Copying of Electronic Public Records).

In some cases, a specific statute may establish a different fee for copies of public records. In such cases, that statute will apply.

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